No. 15-363

IN THE

Supreme Court of the United States

AT&T, INC., ET AL.,
PETITIONERS,
v.
UNITED STATES OF AMERICA, EX REL. TODD HEATH,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS AT&T, INC., ET AL.

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Amicus curiae, DRI—The Voice of the Defense Bar, respectfully submits that this Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

system. This includes cases involving federal pleading standards. See, *e.g., Dart Cherokee Basin Operating Co., LLC* v. *Owens*, 135 S. Ct. 547 (2014).

DRI's interest in this case arises from its support of a uniform pleading standard under Federal Rule of Civil Procedure 9(b) for all allegations of fraud, regardless of the type of fraud alleged. DRI's members and their clients frequently litigate issues involving allegations of fraud throughout the country. DRI believes that the heightened particularity pleading standard established by Rule 9(b) should be consistently applied to all allegations of fraud, whether those allegations are made under the False Claims Act, 31 U.S.C. § 3279, et seq., or otherwise.

Allowing a plaintiff to allege a fraudulent scheme in an FCA case without identifying a particular instance of a false claim is inconsistent with the plain language of Rule 9(b) and the general Rule 9(b) standard applied in other contexts. Rule 9(b) requires a plaintiff to plead with particularity the time, place, and contents of the fraudulent statement or omission that serves as the basis of the plaintiff's claim. This heightened pleading standard not only protects defendants from reputational harm and having to fend off vague claims, but also protects defendants from being leveraged by onerous discovery to settle less-than-meritorious claims. There is nothing in Rule 9(b) that suggests this standard should give way in the context of the FCA. If anything, in the False Claims Act context, where defendants face treble damages, serious civil sanctions, and other costs, the particularity requirement in Rule 9(b) is all the more important.

SUMMARY OF ARGUMENT

The D.C. Circuit held that respondent's FCA claims could survive a motion to dismiss even though the claims identified only a generalized scheme rather than the particular details of an actual false claim. The liberalized fraud-pleading rule the D.C. Circuit adopted exacerbates an ongoing and mature circuit split, see Pet. at 9–19, incentivizes meritless FCA *qui tam* suits, and increases the already significant pressure on defendants to settle such suits. The decision is all the more problematic because it creates an FCA-exception to Federal Rule of Civil Procedure 9(b) where none exists.

The expense of discovery in general civil litigation by its nature pressures defendants to settle even meritless lawsuits. This pressure is substantially greater in fraud lawsuits because of the defendant's risk of reputational injury. Rule 9(b) exists to alleviate some of this pressure from defendants in the context of fraud lawsuits. One of Rule 9(b)'s goals is to protect defendants from *in terrorem* settlements where the cost of discovery, uncertainty, potential damages, and the risk of reputational injury would otherwise strongly militate in favor of settling a meritless lawsuit. The D.C. Circuit, by adopting an exception to Rule 9(b) to allow general allegations of a fraudulent scheme, has undermined Rule 9(b)'s purposes.

The D.C. Circuit's exception to Rule 9(b) is particularly pernicious in the FCA context. The FCA allows for treble damages, civil sanctions, and various costs and fees. FCA lawsuits tend to draw significant media attention, enhancing the risk of

reputational injury to defendants. Moreover, because an FCA-relator stands to reap huge benefits if he or she brings a case to judgment or settlement, the FCA creates incentives to bring even the flimsiest of complaints. The combination of these three elements—the FCA's large damages, enhanced risk of unwarranted reputational injury, and strong incentives for bringing suit—are the very reason that Rule 9(b) should *not* be relaxed in the FCA-context. If Rule 9(b) is meant to protect against extortionate settlements in general, the FCA's unique characteristics make the FCA the last place where a relaxed fraud-pleading standard should be adopted, as several circuits have recognized.

Further, because of the great upsurge in FCA activity, this Court's clarification of the interplay between Rule 9(b) and the FLA is all the more necessary. Recent years have seen a dramatic increase in FCA litigation. In 2014 alone, there were nearly $6 billion in FCA recoveries. Such high stakes only highlight the need for this Court's clarification.

The D.C. Circuit's decision does not just fundamentally undermine the core goals of Rule 9(b). It also finds no justification in Rule 9(b) and the FCA. There is nothing in the text of either Rule 9(b) or the text or structure of the FCA that supports an exception to Rule 9(b) in the FCA-context. The FCA aims at claims, not schemes. Thus, pleading an FCA claim requires a relator to plead specific claims not just overarching schemes. The Court should grant the petition and reverse the court of appeals.

ARGUMENT

I. The Court should grant certiorari to identify the pleading requirements for FCA *qui tam* actions.

A. Rule 9(b)'s meaning and purpose.

Federal Rule of Civil Procedure 9(b) states that, in "alleging fraud or mistake, a party *must state* with *particularity* the circumstances constituting fraud or mistake" (emphasis added). As numerous courts have stated, Rule 9(b) "requires, at a minimum, 'that a plaintiff set forth the 'who, what, when, where, and how' of the alleged fraud.'" *United States ex rel. Steury* v. *Cardinal Health, Inc.*, 625 F.3d 262, 266 (5th Cir. 2010); accord, *e.g.*, *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990); *Sanderson* v. *HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006) (same); *Summerhill* v. *Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011) (same); *Ebeid ex rel. United States* v. *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (same); *United States ex rel. Sikkenga* v. *Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006) (same); *Juniper Networks, Inc.* v. *Shipley*, 643 F.3d 1346, 1350 (Fed. Cir. 2011) (same).

Rule 9(b) serves three essential purposes: "(1) protecting a defendant's reputation from harm; (2) minimizing 'strike suits' and 'fishing expeditions'; and (3) providing notice of the claim to the adverse party." *Vicom, Inc.* v. *Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir. 1994); accord*, DiVittorio* v. *Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987). The particularity requirement especially "deters the use of complaints as a pretext for fishing expeditions of unknown wrongs designed to compel *in terrorem* settlements." *Streambend*

Props. II, LLC v. *Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010-11 (8th Cir. 2015) (internal quotation marks omitted). Rule 9(b) plays a "screening function, standing as a gatekeeper to discovery, a tool to weed out meritless fraud claims sooner than later." Rory Bahadur, *The Scientific Impossibility of Plausibility*, 90 Neb. L. Rev. 435, 497 (2011) (internal quotation marks and citations omitted).

B. The D.C. Circuit's decision undermines Rule 9(b)'s purposes.

The DC Circuit's decision vitiates Rule 9(b)'s purposes by effectively eliminating the particularity requirement for FCA claims. The D.C. Circuit held that respondent's complaint met "Rule 9(b)'s requirements of particularity as to who (AT&T), what (identification of a centralized and institutionalized failure to comply with the lowest-corresponding-price requirement, which resulted in massive overbilling of a governmental program), where (through nineteen subsidiaries and their interactions with E–Rate schools and libraries across the Country), and when (1997 to 2009)." App 21a. But the D.C. Circuit did not deny that the complaint failed to "identify specific, affirmative misrepresentations" on AT&T's part. *Ibid*. Put differently—and as seen in the court's identification of what the complaint *did* provide—the D.C. Circuit held that, under the FCA, a relator need not provide the "how" of the fraud. Indeed, the court held that "the precise details of individual claims are not, as a categorical rule, an indispensable requirement of a viable False Claims Act complaint." *Id*. at 24a. This means that merely alleging the overall fraudulent scheme without explaining *how* the

scheme was implemented is enough to get over the hurdle of a motion to dismiss. *Id.* at 25a.

The implications of this relaxed pleading standard are stark. A relator can take a scattershot approach, alleging an overarching scheme without connecting up the general scheme with specific claims that actually show the alleged scheme was put into action. And that is not nearly enough to satisfy what Rule 9(b) requires.

The D.C. Circuit's decision fundamentally undermines Rule 9(b)'s purposes. By failing to require the relator to specifically identify misrepresentations actually made by defendants in violation of the FCA, the D.C. Circuit's approach subjects defendants to reputational harm and the task of fending off hazy and vague claims. Worse yet, the D.C. Circuit's approach forces defendants to face *in terrorem* pressure to settle less-than-meritorious lawsuits because feeble claims will make it to discovery. Defendants will thus have a Hobson's choice: Go forward with costly and debilitating discovery and the threat of serious damages, or settle a claim regardless of its merit. This is the very choice Rule 9(b) is meant to prohibit and is the very definition of an *in terrorem* lawsuit—"using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent." David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 Colum. L. Rev. 1244, 1254 (2012). The D.C. Circuit's decision wrongly imposes this choice on FCA defendants.

C. Relaxing the fraud-pleading standard for FCA *qui tam* actions enhances the pressure for unjust settlements.

It is indisputable that litigation costs, especially the cost of pretrial discovery, can cause defendants to settle meritless lawsuits. As this Court has noted, "extensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 149 (2008). These effects are magnified in the FCA context.

Several aspects of the FCA scheme mean that the D.C. Circuit's holding will enhance the *in terrorem* effect on defendants. First, the "FCA imposes damages that are essentially punitive in nature." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000). A person who violates the FCA is subject to treble damages. 31 U.S.C. § 3729(a)(1). Each violation of the FCA also makes the person liable for a civil penalty of between $5,000 and $10,000. *Ibid*. Damages need not be proven to recover this civil penalty. *United States ex rel. Hagood* v. *Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Moreover, a relator of an action resulting in judgment or settlement is entitled to mandatory payment of reasonable expenses and attorneys' fees and costs. 31 U.S.C. § 3730(d)(1) & (2) ("Any such person *shall* also receive . . .") ("Such person *shall* also receive . . ." (emphasis added)).

In sum, the "financial consequences of running afoul of the FCA can be extraordinary." Malcolm J. Harkins, III, *The Ubiquitous False Claims Act: The Incongruous Relationship Between a Civil War Era*

Fraud Statute and the Modern Administrative State, 1 St. Louis U.J. Health L. & Pol'y 131, 174 (2007). And as a result, any FCA suit that proceeds beyond the motion to dismiss stage places a defendant under "extreme pressure . . . to settle otherwise unmeritorious suits to avoid risking financial ruin caused by an adverse ruling under the FCA." *Ibid.*

Second, under the FCA a relator has a "strong financial incentive to bring an FCA claim—the possibility of recovering between fifteen and thirty percent of a treble damages award." *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006) (applying heightened pleading standard); see also 31 U.S.C. § 3730(d)(1) & (2). Under the relaxed Rule 9(b) standard the D.C. Circuit adopted with respect to FCA claims, relators have a further incentive to assert questionable claims. Even if only some claims stick, there can be a huge upside for a relator. Thus, the failure to apply Rule 9(b) properly will "precipitate the filing of frivolous suits," *Atkins*, 470 F.3d at 1360, and accentuate a tension that is in the FCA's very DNA. See, *e.g.*, *Sanderson*, 447 F.3d at 876 ("[T]he Act has been repeatedly amended, representing 'a long history of repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.'") (quoting *United States ex rel. Karvelas* v. *Melrose–Wakefield Hosp.*, 360 F.3d 220, 225 (1st Cir. 2004)).

Third, and related to these first two points, is the vast scope and nature of discovery in the FCA context. See, *e.g.*, Mathew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 Yale L.J. 2422, 2434 (2014) (noting the expense and conten-

tiousness of discovery in FCA cases). Even if a defendant thinks it has a case upon which it will likely prevail at the summary judgment stage—a calculated risk by itself—it still faces daunting and prohibitive discovery before that point. This is a huge impediment to defending against a frivolous suit in the normal case. It is exacerbated in the FCA context where, as here, the relator alleges a broad scheme or artifice without particularity.

The scope of such discovery will be, by its nature, broader than a case which alerts a defendant to specific incidents of fraud. And the broad resultant discovery in turn can potentially allow a relator to prolong the litigation by jettisoning the initial claims in favor of new theories after rooting through the defendant's records. *E.g.*, *United States ex rel. Johnson* v. *Kaner Med. Grp., P.A.*, 2015 WL 631654 at *5 n.7 (N.D. Tex. Feb. 12, 2015) ("By pleading what appear to have been false claims in her original complaint, plaintiff probably avoided dismissal and was thus able to engage in extensive discovery directed against defendants seemingly for the purpose of seeking to crate out of whole cloth the appearance of a basis for an FCA claim.").

Fourth, the pressure to settle is further leveraged in the FCA context because "FCA defendants are also exposed to the threat of a corporate death sentence." Michael Lockman, Note, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1559, 1571 (2015). This is so because "[u]nder the Federal Acquisition Regulation, agency officials have broad discretion to temporarily debar or permanently suspend a government contractor after a finding of FCA liability." *Ibid*. While petitioner might be able to

survive such a temporary or permanent debarment because its lifeblood is not government contracts, "[m]any FCA defendants in the defense and health-care sectors almost certainly could not exist without the government as a contractual partner." *Ibid.* "[E]ven a temporary debarment can irreparably cripple a government contractor." *Ibid.*[2]

Thus, while a relaxed Rule 9(b) standard in general would lead to *in terrorem* effects in fraud cases—precisely why the heightened standard of Rule 9(b) exists—it will have an especially harmful effect in the FCA context. The Eleventh Circuit, which, in contrast to the D.C. Circuit, applies Rule 9(b) the same in the FCA context as in other contexts, articulated the host of concerns when courts decline to apply Rule 9(b) in the FCA context:

> The particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process *without identifying a single claim*. If given such a ticket, the next stage of [the] litigation is clear. The Plaintiff will request production of every . . . claim [document] submitted by the Defendant[.] . . . . At that point, the Defendant may decide to settle the case to avoid the enormous cost of such discovery and the possible disruption of its ongoing business. [*Atkins*, 470 F.3d

[2] Most FCA settlements include Corporate Integrity Agreements that the government requires as a condition for continued participation in various healthcare, defense, or other programs. See *ibid.*

> at 1359 (internal citations and quotation marks omitted) (emphasis added).]

In short, the "particularity requirement of Rule 9(b), if enforced, will not only protect defendants against strike suits, but will result in claims with discernable boundaries and manageable discovery limits." *Ibid.*

The D.C. Circuit's approach undermines the very purposes for which Rule 9(b) exists. It gives relators, regardless of the merits of their claims, tickets to discovery and thus severely threatens defendants with *in terrorem* settlements. As the Eleventh Circuit has cautioned, this is the natural result when a relator need not identify a single claim, as the D.C. Circuit's decision allows.

II. There is no FCA exception to the general pleading standard.

When "alleging fraud . . . a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "Rule 9(b) does not discriminate between various allegations of fraud. Instead, it applies to *any* claim that includes 'averments of fraud or mistake.'" *Cal. Pub. Employees' Ret. Sys.* v. *Chubb Corp.*, 394 F.3d 126, 161 (3d Cir. 2004) (emphasis added). Accordingly, courts have applied Rule 9(b) to all sorts of fraud in a variety of contexts. See, *e.g.*, *Quintero Cmty. Ass'n Inc.* v. *F.D.I.C.*, 792 F.3d 1002, 1010 (8th Cir. 2015) ("Rule 9(b)'s particularity requirement for fraud applies equally to a claim for aiding and abetting." (internal quotation marks omitted)); *Frank* v. *Dana Corp.*, 547 F.3d 564, 569–70 (6th Cir. 2008) ("Securities fraud claims arising under Section 10(b), as with *any* fraud claim,

must satisfy the particularity pleading requirements of Rule 9(b)." (emphasis added)); *Wivell* v. *Wells Fargo Bank, N.A.*, 773 F.3d 887, 898 (8th Cir. 2014) (applying Rule 9(b) to a negligent misrepresentation claim); *Tal* v. *Hogan*, 453 F.3d 1244, 1263 (10th Cir. 2006) (applying Rule 9(b) to mail and wire fraud).

Rule 9(b)'s "reference to 'circumstances' . . . is to matters such as the time, place, and contents of the false representation or omissions, as well as the identity of the person making the misrepresentation or failing to make a complete disclosure and what that defendant obtained thereby." 5A Charles A. Wright et al., *Federal Practice & Procedure* § 1297 (3d ed. 2004). So it should never be the case that a plaintiff asserting fraud, such as a relator, can survive a motion to dismiss without specific allegations regarding the fraud committed, such as a specific instance of a false or fraudulent claim submitted to the government.

The D.C. Circuit's holding creates an FCA-claim exception to Rule 9(b). And it does so even though nothing in the Rule or in the FCA itself suggests that the particularity requirement—the who, what, when, where, and how—should give way in the FCA context. There is simply no FCA-exception to Rule 9(b)'s heightened pleading standard.

Quite the opposite, the FCA's language and structure suggest that particularity is required because a general allegation of a scheme is not enough to violate the FCA. As this Court has stated, "the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States* v. *McNinch*, 356 U.S. 595, 599 (1958). Even a cursory examination of 31 U.S.C. § 3729(a)

demonstrates that it reaches specific *assertions* and *statements*—specific, discrete actions.

For instance, the FCA establishes liability for anyone who presents "*a* false or fraudulent claim," uses "*a* false record or statement material to a false or fraudulent claim," or uses "*a* false record or statement material to an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(1)(A), (B), & (G) (emphasis added). The FCA also establishes liability for specific acts, such as "possession, custody, or control of property or money used . . . by the Government," and buying property from a member of the Armed Forces who may not legally sell the property. 31 U.S.C. § 3729(a)(1)(D) & (F).

This specificity requirement means that "liability under the Act *attaches only* to a claim actually presented to the government for payment, *not* to the *underlying fraudulent scheme*." *United States ex rel. Nathan* v. *Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 456 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1759 (2014) (emphasis added). So a mere scheme to submit a false claim for payment to the government is not prohibited by the Act. The actual submission of a false claim for payment is.

Under the D.C. Circuit's approach, a relator can allege a scheme to submit a false claim for payment without alleging a single specific instance when such claims were submitted and still be deemed to have made the particularized allegations Rule 9(b) requires. But nothing in the FCA's text or structure suggests that Rule 9(b)'s normal requirements are relaxed when a relator brings an FCA claim. Indeed, Rule 9(b)'s purposes will be especially undermined if there is an FCA-exception to Rule 9(b). Further, the

mature circuit split on this question means that some defendants will receive the full protection of Rule 9(b) while others will not. Accordingly, certiorari is warranted to ensure that Rule 9(b) applies uniformly in all circuits, including in the FCA context.

III. This Court's clarification of the interplay between Rule 9(b) and the FCA is crucial given the upsurge in FCA activity.

The recent increase in false-claims litigation and recovery is staggering. In the five years since Congress amended the FCA by enacting the Fraud Enforcement and Recovery Act, the government has collected some $23 *billion* on FCA claims and has initiated almost 4,000 new FCA actions. In 2013, the government collected a record $5 billion in FCA recoveries, then topped that record in 2014 with $5.7 billion in collections.

This record filing and recovery activity was accompanied by a dramatic increase in relator activity. Indeed, although the FCA's whistleblower provisions were enacted some 28 years ago, the past five years witnessed more than a third of all FCA *qui tam* actions ever filed. This activity caused relators' rewards to escalate as well, totaling $435 million in 2014 alone.[3]

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[3] See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), available at http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.

Given the high financial stakes, there is no reason to expect a sudden reversal in these trendlines. This means that companies will face an ever increasing number of relator actions, highlighting the need for this Court's immediate clarification of the FCA pleading standard, wholly aside from the deep and mature circuit split explained at length in the petition.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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OCTOBER 2015